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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

BRITT CARD et al.,	
Objectors and Appellants,	G056114
v.	(Super. Ct. No. 30-2016-00876596)
WILLIAM L. DUL as Trustees, etc., et al.,	O P I N I O N
Petitioners and Respondents.	

Appeal from a judgment of the Superior Court of Orange County, Hugh Michael Brenner, Judge. (Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Elena Reyes for Objectors and Appellants.

Price, Crooke, Gary & Hammers, Bruce J. Gary, Stephen G. Hammers; Hammers, PC and Stephen G. Hammers for Petitioners and Respondents.

* * *

INTRODUCTION

Between the settlor's death and the distribution of the trust assets, the value of an estate decreased significantly. Certain beneficiaries filed a petition seeking to recover damages from the successor trustees due to alleged breaches of their fiduciary duties. The trial court found no violations of any duties on the part of the successor trustees.

On appeal, we hold that, although the successor trustees failed to timely submit a report and account, as required by statute and by the trust's language, that failure was not prejudicial to the beneficiaries. We further hold that substantial evidence supports the trial court's findings that the successor trustees did not otherwise breach their fiduciary duties. We therefore affirm.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Keith E. Card was the settlor and trustee of the Keith E. Card Revocable Trust 1996 (the Trust); the Trust was restated in 2009 and amended in 2010. Keith[1] died in March 2011, at which time the Trust became irrevocable; pursuant to the Trust's terms, William L. Dul and David A. Poole (collectively the Trustees) succeeded Keith as trustees.

The Trust provided that after Keith's death, the Trustees were to pay his widow, Barbara Card, $700,000 plus the amount necessary to purchase an annuity to provide her with $4,000 per month for the remainder of her life. (The Trustees ultimately determined the proper amount of the annuity was $637,963.51.) The balance of the estate was to be distributed to Keith's grandchildren and stepgrandchildren (Barbara's grandchildren), in an amount equal to the applicable generation-skipping transfer exclusion, with a grandchild's share not to exceed $200,000, and a stepgrandchild's share

[1] We will refer to the members of the Card family by their first names to avoid confusion; we intend no disrespect.

not to exceed $100,000. Any portion of the Trust estate remaining after distribution to the grandchildren and stepgrandchildren would be distributed to two of Keith's living children, and the issue of his third living child (from whom Keith was estranged).

One of the main Trust assets was Keith's property in Murrieta, California. The property included 10 acres of land, a five-bedroom ranch house in which Keith and Barbara lived, a smaller residence occupied by the ranch foreman, a barn, stables, paddocks, and other structures. The property was not listed for sale until June 2012, after Barbara had located a new home in which to live, and after the wedding of one of Keith's grandchildren had been held there. The original asking price was $2.9 million; the property sold in July 2016 for just over $1.3 million.

The other significant asset of the Trust was the KEC Company, a California corporation (KEC). Keith operated KEC for the purposes of racing horses and paying for maintenance of the property. After the property was sold, KEC was dissolved in August 2016 and its remaining assets were moved into the Trust.

The Trustees filed a first and final report and account and petition for settlement with the court in September 2016. Beneficiaries Britt Card, Teague Card, Chelsea Cumings and Shane Cumings (collectively the Beneficiaries), all of whom were grandchildren or stepgrandchildren of Keith,[2] objected to the Trustees' petition and requested damages from the Trustees due to their alleged breaches of fiduciary duty. The Trustees filed objections to the Beneficiaries' petition, and a supplement to their own petition responding to the probate examiner's notes.

Following a bench trial, the trial court entered judgment in favor of the Trustees with respect to both the petition to approve the report and account and the Beneficiaries' petition to recover damages from the Trustees due to alleged breaches of

[2] Shannon Woolgar, on behalf of minor beneficiaries Jake Woolgar and Hannah Woolgar (two of Keith's stepgrandchildren), was a petitioner in the trial court. Woolgar has not pursued the matter on appeal, however.

fiduciary duty. No statement of decision was requested. The court provided the following oral statements from the bench supporting its findings:

"I'm going to disallow the challenges to the petition. So that's the court's fundamental finding. [¶] . . . It does appear to me that the test is whether the Trustees acted in good faith. It seems to me that they did. As this case started, you know, you imagine what you're going to hear. You think, well, we're going to hear something about self-dealing or there is going to be something that they favored some non beneficiary, there's some shenanigans that went on here, and we heard none of that. None of that at all, and no motive was ever provided that remotely suggested that they would not act in good faith."

The Beneficiaries appealed.

DISCUSSION

In this case, no statement of decision was requested at the bench trial. We must therefore apply the doctrine of implied findings, "meaning that we presume the trial court 'made all factual findings necessary to support the judgment for which substantial evidence exists in the record. In other words, *the necessary findings of ultimate facts will be implied* and the only issue on appeal is *whether the implied findings are supported by substantial evidence*.'" (*LSREF2 Clover Property 4, LLC v. Festival Retail Fund 1, LP* (2016) 3 Cal.App.5th 1067, 1076, italics added.)

A trial court's finding that a trustee has not breached his or her fiduciary duties to the trust's beneficiaries is reviewed for substantial evidence. (*Penny v. Wilson* (2004) 123 Cal.App.4th 596, 603.)[3] To the extent the trial court interpreted the Trust

[3] Throughout their appellate briefs, the Beneficiaries argue that the trial court ignored substantial evidence supporting their position. This is not the correct legal standard of appellate review.

instrument, our review would be de novo. (*Estate of Cairns* (2010) 188 Cal.App.4th 937, 944.)

The Beneficiaries point to the decrease in the value of the Trust estate between the time of Keith's death and the time the first report and account were filed. Based on the values presented by the Trustees in the report and account, the value of the Trust assets at Keith's death was in excess of $3.2 million. However, only $33,321 was available for distribution to the Beneficiaries and the other grandchildren and stepgrandchildren. When looked at solely with these numbers in mind, the question naturally arises whether there was a breach of fiduciary duty by the Trustees.

I.

THE BENEFICIARIES DID NOT WAIVE THEIR RIGHT TO CHALLENGE THE TRUSTEES' FINAL REPORT AND ACCOUNT BY STIPULATING THAT IT WAS COMPLETE AND ACCURATE.

The Trustees argue that, by stipulating that the accounting was complete and accurate and the burden of proof at trial should be shifted to the Beneficiaries, the Beneficiaries waived any right to challenge the report and account. Before the trial started, the following colloquy occurred:

"Ms. Reyes [counsel for the Beneficiaries]: Since I have the burden of proof in this case, I'll proceed?

"Mr. Hammers [counsel for the Trustees]: Actually, your Honor, we're not exactly on point. . . . When a petitioner files an accounting, the petitioner who files the accounting has the burden of showing that the accounting is complete and accurate. That's a matter of law, from [*Purdy v. Johnson* (1917) 174 Cal. 521].[4] [¶] After the

[4] "The entire trial was conducted upon the erroneous theory that the burden of proof was upon the beneficiary to point out the particulars in which the account was erroneous, and that she was bound to go forward and establish affirmatively the impropriety of the charges and credits which she assailed. Such is not the law. [¶] . . . [¶] . . . [I]n fact, the burden is upon the trustees to prove that charges made by them are proper." (*Purdy v. Johnson, supra*, 174 Cal. at pp. 527, 530.)

petitioner carries that burden, then if there is a challenge to it for example, a challenge to the accounting, the burden shifts. . . . [I]f counsel wants to stipulate that the accounting is complete and accurate, we can shift it right now.

"Ms. Reyes: Your Honor, we stipulate that the accounting is complete. There is one little spot where it doesn't accurately reflect the size of the estate, but it's not an issue. [¶] Our biggest objection—the biggest part of this case is our objection to the actions of the Trustees and that they breached their responsibility as Trustees. So I think that's what our case is about."

After further discussion, the parties agreed that the Beneficiaries would proceed with their case first. During the trial, the Beneficiaries presented extensive evidence of the Trustees' alleged errors in preparing the accounting.

Our review of the foregoing exchange between counsel convinces us that the parties stipulated that the Trustees need not prove the accounting was complete and accurate, shifting the burden at the outset to the Beneficiaries to prove the accounting's inadequacies and errors. However, the Beneficiaries did not thereby waive any right to challenge the accounting.

II.

THE TRUSTEES VIOLATED THEIR DUTY TO REPORT AND ACCOUNT, BUT THE BENEFICIARIES SUFFERED NO PREJUDICE AS A RESULT.

Keith died in March 2011. Until that time, Keith had been the sole trustee of the Trust. At his death, the Trust became irrevocable, and Dul and Poole became the successor Trustees. Dul and Poole filed their first and only accounting in September 2016. The court found "there is some accountings missing that should have been given," but concluded the information provided to the Beneficiaries' parents (Keith's children Les and Nanette) was sufficient.

Under the Probate Code, the Trustees were required to provide an account when they became Trustees following Keith's death, and at least annually thereafter.

"Except as otherwise provided in this section and in Section 16064, the trustee shall account at least annually . . . and upon a change of trustee, to each beneficiary to whom income or principal is required or authorized in the trustee's discretion to be currently distributed." (Prob. Code, § 16062, subd. (a).)

The terms of the Trust include the following: "My trustee shall report, at least semi-annually, to the beneficiaries then eligible to receive mandatory or discretionary distributions of the net income from the various trusts created in this agreement all of the receipts, disbursement, and distributions occurring during the reporting period along with a complete statement of the trust property."

The Trustees contend that they were not required to account to the Beneficiaries because nothing was due to the Beneficiaries before the final account was submitted. We do not need to engage in the same semantic gymnastics as the Trustees for the simple reason that Probate Code section 16062, subdivision (a) requires an account "upon a change of trustee"—which occurred at Keith's death. The language of the Trust does not contradict the statutory language; to the contrary, it provides additional accounting requirements beyond those imposed by the Probate Code.

The issue, however, is the lack of harm caused by the Trustees' failure to comply with the requirement to account. In their opening brief, the Beneficiaries contend that if they had "received a true and proper account at or near [Keith]'s death, and every six (6) months thereafter, they could have monitored the activities of the Trust and would have known to take action sooner to prevent the extreme losses." Their argument fails for two reasons. First, the Beneficiaries do not identify any action they could or would have taken. The Beneficiaries' ultimate complaint is that the Trustees held the real property and the assets of KEC too long, which led to significant expenses to maintain them. There is no evidence that the sales of the assets could have been expedited with the same revenue being realized.

Second, none of the actions or inactions the Trustees are alleged to have taken were hidden from the Beneficiaries. The purpose for requiring a trustee to report and account for the financial status of a trust is to ensure the trustee cannot take actions to benefit him or herself or to damage the trust or the beneficiaries. For example, when a trust consists primarily of investments, the beneficiaries may have no means of determining what is happening with the trust estate absent the trustee's report and account. Here, to the contrary, the trust estate consisted of the family home and the horse breeding and horse racing business. Barbara's presence in the home and presence of the horses on the property made it obvious that the assets of the Trust were being held and not sold. The continued employment of a nonbeneficiary as ranch foreman was also obvious. Further, it is undisputed that Nanette, one of Keith's children and the mother of two of the Beneficiaries, and Barbara, the grandmother of two of the other Beneficiaries, were involved in and had full knowledge of the decisions regarding the sale of the property and the sale of KEC's assets.

We hasten to reiterate that the Trustees failed to report and account to the Beneficiaries as required by statute and by the language of the Trust. We do not condone such a violation of the Trustees' duties and in an appropriate case this failure could result in the imposition of a surcharge or other damage order against the Trustees. Because no damage to the Beneficiaries has been demonstrated as a result of the lack of a report and account by the Trustees, in this case the Trustees' breach of this duty does not result in any damages.

III.

THE TRIAL COURT DID NOT ERR BY FINDING THE TRUSTEES DID NOT VIOLATE THEIR FIDUCIARY DUTIES.

The Probate Code and the language of the Trust imposed on the Trustees the duty to take control of and preserve the Trust property,[5] the duty to make the Trust property productive,[6] the duty to avoid favoring nonbeneficiaries over beneficiaries,[7] and the duty to avoid favoring one beneficiary over another.[8] The Beneficiaries contend the Trustees violated these duties by failing to sell the ranch property and the horse breeding and horse racing business in a timely manner; by providing salary, housing, and other benefits to the ranch foreman, who was not a named beneficiary of the Trust; and by allowing Barbara to continue living in the ranch property for an extended time rent free.

With respect to the ranch property, the Beneficiaries contend that the Trustees breached their duties by failing to list the property for sale for more than a year

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[5] The Probate Code provides: "The trustee has a duty to take reasonable steps under the circumstances to take and keep control of and to preserve the trust property." (Prob. Code, § 16006.) The Trust states: "My trustee may retain and continue any business in which I have or had an interest as a shareholder, partner, sole proprietor, or as a participant in a joint venture, even though that interest may constitute all or a substantial portion of the trust property."

[6] The Probate Code provides: "The trustee has a duty to make the trust property productive under the circumstances and in furtherance of the purposes of the trust." (Prob. Code, § 16007.) The Trust states: "My Trustee may retain, without liability for depreciation of loss resulting from such retention, all property constituting the trust estate at the time of its creation or thereafter received from other sources. [¶] . . . [¶] My Trustee may hold property which is non-income producing or is otherwise nonproductive if the holding of such property is, in the sole and absolute discretion of my Trustee, in the best interests of the beneficiaries."

[7] The Probate Code provides: "The trustee has a duty to administer the trust solely in the interest of the beneficiaries." (Prob. Code, § 16002, subd. (a).)

[8] The Probate Code provides: "If a trust has two or more beneficiaries, the trustee has a duty to deal impartially with them and shall act impartially in investing and managing the trust property, taking into account any differing interests of the beneficiaries." (Prob. Code, § 16003.)

after Keith's death, and by failing to consider an appraisal of the property when setting the offer price. The court found that the Trustees acted reasonably as to when and at what price they listed the property for sale. The court further found the Trustees acted reasonably in allowing Barbara to remain in the residence for an extended period of time after Keith's death.

Substantial evidence supported the finding that the Trustees did not breach their fiduciary duties in setting the asking price for the property. In February 2012, the Trustees obtained an appraisal of the property for use in obtaining a $750,000 bank loan. The appraisal determined the value of the property was $1 million. The Trustees did not consider the appraisal useful in setting the asking price of the property. Poole testified that because the bank required a 75 percent loan to value ratio, and the appraisal showed a $1 million value against a $750,000 loan, he did not believe the appraisal was a true representation of the property's value.

Bonnie Hinman was selected as the listing agent for the sale of the property. Hinman lived in the same neighborhood, and was a real estate agent with experience in the area, which she described as a "niche" market. The initial asking price for the property was set by Poole, Barbara, Les, and Nanette. The group agreed there "wasn't a big urgency" to sell the property, and they wanted to try to get as much as they could for it. In setting the price, the group considered comparable property prices (one of which was listed close to $4.5 million) and Keith's previously expressed belief that the property was worth $4 million. The group thought the $1 million appraisal obtained in connection with the bank loan was too low.

Hinman described the property as "a ten-acre property, all usable, cross and cross-fenced . . . . A home, approximately 5500-square-foot, a guest home approximately 2400-square-foot, a barn with four stalls, some hay storage in it, hot walker, another equipment barn, pool, solar on it; beautiful property." Hinman and the broker for whom

she worked believed the initial asking price of $2.9 million was appropriate and was supported by the relevant comps.

The property was shown "a lot" during the first several months it was on the market, although no serious offers were received, causing the Trustees to maintain the asking price.[9] Hinman believed that the economy had a lot to do with the lack of offers. In 2013, the Trustees dropped the asking price to $2.1 million, although Les and Nanette wanted to "hold out and get as much as they could." Hinman continued to alert Poole, Barbara, and Nanette whenever she showed the property. In early 2014, Hinman received an offer of $1.4 million, which was countered at $1.75 million; a sale did not conclude. Barbara suggested taking the property off the market, and then putting it back on the market at a higher price. Poole communicated to Nanette: "I do not know if there is a real advantage to taking the property off the market for a few months, but at this point I would be willing to try anything to get the property sold."

In Spring 2014, the listing price was reduced from $2.1 million to $1.99 million. In June 2015, the Trustees changed realtors, and listed the property with Sotheby's in order to appeal to a broader audience and use a broker who could spend more on advertising. At that point, the listing price was reduced to $1.5 million. The property sold two months later for $1.3 million.

Substantial evidence also supported the trial court's finding that the decision to allow Barbara to live in the property for more than one year after Keith's death was not a violation of the Trustees' duties to the Beneficiaries. Barbara had lived in the home for more than 20 years. In addition to time to grieve, Barbara needed time to find and purchase a new home. One of Keith's grandchildren (not one of the Beneficiaries) requested permission to hold his wedding on the property.

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[9] One offer was received in April 2013 at $800,000. The offer was considered to be so low that it was an insult and was not countered.

With regard to the horse racing and horse breeding business, the court found that the Trustees acted reasonably in how they sold the business, and that the prudent investor rule did not apply because the type of business involved was not a true "investment."

Here, too, substantial evidence supported the trial court's findings. KEC was originally a construction business, but by the time of Keith's death was solely in the business of breeding and racing horses. As a horse-related company, KEC was not productive, although it did own one winning horse, California Flag. The Trustees continued to race California Flag, which won one race after Keith's death. The Trustees then decided California Flag's possibility of success was not worth its expenses, and put it out to pasture, in accordance with Keith's wishes. (Because California Flag was a gelding, it had no value as a stud.)

The Trustees sold or euthanized all other horses owned by KEC in 2011 or 2012. Until they were sold or euthanized, the Trustees continued to pay to feed, house, exercise, train, and provide veterinary services for the horses. Other than paying the expenses to retain the investment in the horses, the Trustees did not make any investments in horses after Keith's death. The Trustees explained why it took them until 2012 to sell some of the horses—one horse was jointly owned with another couple; the horses were to be sold at auctions, the dates of which the Trustees did not control; and some of the horses did not obtain their minimum bids at the first auction at which they were offered.

With regard to the Trustees' alleged preference of a nonbeneficiary over the Beneficiaries, the trial court found that the treatment of ranch foreman Gene Scott Siler was in keeping with Keith's wishes, and was not unreasonable. Siler was employed by KEC and lived rent free in one of the buildings on the property. Siler received a salary, and KEC paid his healthcare and utilities. Before his death, Keith verbally agreed that Siler could continue to live on the property until it was sold. Siler performed

maintenance on the property, and trained the horses until they were sold. After Siler's employment was terminated following the sale of the property in July 2016, Siler told the Trustees he was entitled to unused vacation and sick pay and to a severance payment. In order to avoid a possible wrongful termination lawsuit, the Trustees allowed Siler to keep a truck and trailer he had been using.

Finally, as noted *ante*, substantial evidence supported the finding that allowing Barbara to continue living in her home of more than 20 years was not a violation of the Trustees' duty not to favor one beneficiary over another.

DISPOSITION

The judgment is affirmed. Respondents to recover costs on appeal.

FYBEL, J.

WE CONCUR:

ARONSON, ACTING P. J.

THOMPSON, J.